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Seremban Gold Resort Bhd v Amerfab Sdn Bhd

HIGH COURT (SEREMBAN) — CIVIL NO 12–35 OF 2003
LOW HOP BING J
12 DECEMBER 2005

B

Civil Procedure — Sessions Court — Claim from innocent party to put an end to its future obligations under the sale and purchase agreement — Whether rescission of agreement — Whether Sessions Court has jurisdiction to hear the matter — Subordinate Courts Act 1948 s 69(b)

C

Civil Procedure — Summary judgment — Setting aside — Issue pertaining to privity of contract — Whether there is an issue which ought to be tried — Whether a plain and obvious case for summary judgment

D

The plaintiff and both the defendants herein have executed a sale and purchase agreement ('the SPA'), wherein the plaintiff was the purchaser, the first defendant, the vendor and the second defendant the registered proprietor of the lands ('the lands'). The second defendant has granted the first defendant the right to subdivide, develop
E and sell the lands as a commercial centre. The first defendant has under the SPA agreed to sell to the plaintiff a three-storey shop office unit with a land area of 2510 sq ft ('the unit') at a consideration of RM617,460. Clause 20 of the SPA provides for the time for handing over vacant possession together with the connection of water and electricity supply to the unit within 24 months from the date of the SPA, failing
F which the first defendant shall pay liquidated damages immediately to the plaintiff. As the defendants have failed to fulfil the obligations under cl 20 of the SPA, the plaintiff terminated the SPA and demanded repayment of RM60,000 paid by the plaintiff to the first defendant. The second defendant replied that it was in the midst of discussion with its banker to revive and restructure the project and that upon receipt of the green light from its banker which was expected within two months
G thereof, it would inform the plaintiff of its development plan and to resolve this matter amicably. However, as nothing was done by the second defendant, the plaintiff commenced this action and proceeded to obtain a summary judgment against both the defendants. This was an appeal by the second defendant.

H

Held, allowing the appeal:

(1) The plaintiff's claim arose from its right as an innocent party to put an end to its future obligations under the SPA and so did not constitute a true rescission as provided for in s 69(b) of the Subordinates Courts Act 1948. That being the
I case it was properly within the jurisdiction of the sessions court (see para 18); *Yap Sew Lim lwn Pulau Kembar Sdn Bhd* [2005] 7 CLJ 340 followed.

(2) Whether or not the second defendant as the registered proprietor of the lands can be held liable under the SPA is not plain and obvious, as it would involve an issue pertaining to privity of contract. Such an issue has been resolved by

way of a full trial, and not by way of summary judgment. The liability of the second defendant under the SPA is an issue which ought to be tried: *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 followed. It was not a plain and obvious case for summary judgment. In the circumstances, the learned sessions court judge had erred in entering summary judgment against the second defendant (see paras 23, 25).

[Bahasa Malaysia summary

Plaintif dan kedua-dua defendan telah melaksanakan perjanjian jual beli ('SPA') di mana plaintif adalah pembeli, defendan pertama, penjual dan defendan kedua penjual berdaftar tanah-tanah ('tanah'). Defendan kedua telah memberikan defendan pertama hak untuk mensubbahagi, membangunkankan dan menjual tanah sebagai kawasan perindustrian. Defendan pertama di bawah perjanjian jual beli bersetuju menjual kepada plaintif bangunan tiga tingkat kedai unit dengan kawasan 2510 kaki persegi ('unit') pada pertimbangan RM617,460. Klausa 20 perjanjian jual beli memperuntukkan bahawa masa penyerahan harta milik kosong bersama dengan penyambungan bekalan air dan elektrik kepada unit selama 24 bulan dari tarikh perjanjian jual beli, jikalau gagal defendan pertama mesti membayar jumlah ganti rugi dengan serta merta kepada plaintif. Sebagaimana defendan gagal untuk melaksanakan obligasi di bawah kl 20 perjanjian jual beli, plaintif telah membatalkan perjanjian jual beli dan meminta bayaran sebanyak RM60,000 dibayar oleh plaintif kepada defendan pertama. Defendan kedua menjawab bahawa ia masih dalam proses perbincangan dengan pengurus bank untuk menghidupkan dan membangunkan projek dan atas persetujuan daripada pengurus bank yang diinganken dalam masa dua bulan, plaintif akan diberitahu tentang rancangan pembangunan dan juga untuk menyelesaikan masalah ini secara damai. Akan tetapi, seperti bagaimana tiada apa yang dilakukan oleh defendan kedua, plaintif telah memulakan tindakan ini dan telah mendapatkan satu penghakiman terus terhadap kedua-dua defendan. Ini merupakan satu rayuan oleh defendan kedua.]

Diputuskan, membenarkan rayuan:

(1) Tuntutan plaintif wujud daripada hak sebagai parti yang tidak bersalah untuk menamatkan obligasi di bawah perjanjian jual beli dan tidak merupakan satu pembatalan yang benar seperti yang diperuntukkan didalam s 69(b) Akta Mahkamah Rendah 1948. Ia adalah di dalam bidang kuasa mahkamah seksyen (lihat perenggan18); *Yap Siew Lim lwn Pulau Kembar Sdn Bhd* [2005] 7 CLJ 340 diikut.

(2) Sama ada defendan kedua sebagai pemilik tanah berdaftar boleh bertanggungjawab di bawah perjanjian jual beli adalah bukan jelas dan ketara, sebagaimana akan melibatkan isu berkaitan dengan privity kontrak. Isu seperti ini telah diselesaikan melalui perbicaraan penuh dan bukan melalui penghakiman terus. Liabiliti defendan kedua di bawah perjanjian jual beli adalah satu isu yang patut diperbicarakan; *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 diikut. Ia bukan merupakan satu kes yang jelas dan

ketara bagi penghakiman terus. Di dalam keadaan-keadaan, hakim mahkamah yang bijaksana telah salah memasuki penghakiman terus terhadap defendan kedua (lihat perenggan 23, 25).

Notes

For a case on setting aside, see 2(2)*Mallal's Digest* (4th Ed, 2004 Reissue) para 6241.

For cases on jurisdiction of sessions court, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 5616–5618.

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500 (refd)

Car & Universal Finance Co Ltd v Caldwell [1961] 1 QB 525 (refd)

Hospital Pantai Ayer Keroh Sdn Bhd v Lu Wei Hong [2005] 4 MLJ 155 (refd)

Johnson & Anor v Agnew [1979] 1 All ER 883 (refd)

Kepong Prospecting Ltd & Iors v Schmidt [1968] 1 MLJ 170 (folld)

Mc Donald v Dennys Lascelles Ltd [1933] 48 CLR 457 (refd)

Yap Siew Lim lwn Pulau Kembar Sdn Bhd [2005] 7 CLJ 340 (folld)

Legislation referred to

Specific Relief Act 1950 Chapter IV
Subordinate Courts Act 1948 s 69(b)
Subordinate Courts Rules 1980 O 26A

Syuhaeda Aeni bte Mat Ali (Azhar & Wong) for the appellant.
Chandrasegar Subramaniam (Vijian Chandran & Partners) for the respondent.

Low Hop Bing J:

APPEAL

[1] This was an appeal by the appellant-second defendant ('the second defendant') against the decision of the learned sessions court judge who had on 26 June 2003 entered summary judgment against both the defendants under O 26A of the Subordinate Courts Rules 1980.

[2] There was no appeal by the first defendant.

FACTUAL BACKGROUND

[3] The plaintiff and both the defendants herein have executed a sale and purchase agreement on 27 May 1997 ('the SPA') wherein the plaintiff was the purchaser, the first defendant, Nusan Land Sdn Bhd, the vendor and the second defendant, the registered proprietor of the lands held under HS(D) 99118 Pt No 18526, HS(D) 99119 PT No 18527 and HS(D) 99120 PT No 18528 all in the mukim of Ampangan, district of Seremban (collectively 'the lands').

[4] The second defendant has granted the first defendant the right to subdivide, develop and sell the lands as a commercial centre.

[5] The first defendant has under the SPA agreed to sell to the plaintiff a three-storey shop office unit No D-76 with a land area of 2510 sq ft ('the unit') at a consideration of RM617,460.

[6] Clause 20 of the SPA provides for the time for handing over vacant possession together with the connection of water and electricity supply to the unit within 24 months from the date of the SPA, failing which the first defendant shall pay liquidated damages immediately to the plaintiff.

[7] As the defendants have failed to fulfil the obligations under cl 20, the plaintiff has vide its solicitors' letter dated 11 December 2001 terminated the SPA and demanded repayment of RM60,000 paid by the plaintiff to the first defendant.

[8] Vide letter dated 20 December 2001, the second defendant replied that it was in the midst of discussion with its banker to revive and restructure the project and that upon receipt of the green light from its banker which was expected within two months thereof, it would inform the plaintiff of its development plan and to resolve this matter amicably.

[9] However, as nothing was done by the second defendant, the plaintiff has commenced this action and proceeded to obtain the aforesaid summary judgment against both the defendants.

ISSUE OF RESCISSION

[10] The second defendant's learned counsel Miss Syuhaeda Aeni binti Mat Ali contended that the plaintiff has sought the remedy of rescission which is outside the jurisdiction of the sessions court, on the basis of s 69(b) of the Subordinates Courts Act 1948.

[11] The response of the plaintiffs learned counsel Mr S Chandrasegar is that rescission was not sought by the plaintiff as it was a claim for the refund of money paid by the plaintiff after terminating the SPA.

[12] The question before me is whether the plaintiff is seeking rescission of the SPA.

[13] Section 69(b) of the Subordinate Courts Act 1948 provides, where relevant, as follows:

(1) Sessions Court shall have no jurisdiction in actions, suits or proceedings of a civil nature-

(a) …

(b) for… rescission of contracts.

[14] In my judgment, rescission of contract must be distinguished from its termination. The judgment of Dixon J in *Mc Donald v Dennys Lascelles Ltd* [1933] 48 CLR 457 is explained as follows:

(1) When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected;

(2) When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be to the position they occupied before the contract was made; and

(3) When a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.

[15] The above principles were affirmed in *Johnson & Anor v Agnew* [1979] 1 All ER 883 by Lord Wilberforce who illuminated further:

(1) a true rescission is a rescission ab initio such as may arise for example in cases of mistake, fraud or lack of consent, in which the contract is treated in law as never having come into existence;

(2) in the case of an accepted repudiatory breach, the contract has come into existence but has been put an end to or discharged; and

(3) it is now quite clear that under the general law of contract, acceptance of a repudiatory breach does not bring about rescission *ab initio*.

[16] Gopal Sri Ram JCA in a judgment delivered for the Court of Appeal in *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500 crystallized further as follows:

(1) true rescission is a specific relief and is available to a litigant either as a self help upon satisfaction of certain conditions (see *Car & Universal Finance Co Ltd v Caldwell* [1961] 1 QB 525) or as a judicial remedy obtainable in an action;

(2) rescission was invented by the Court of Chancery and now finds its place in Chapter IV of our Specific Relief Act 1950;

(3) rescission has the effect of setting at naught the contract void *ab initio* and not merely as to obligations *de futuro*;

(4) rescission places the parties on a footing as though a contract had never been made; and

(5) terminating the act of future obligations under a contract and true rescission are two different acts altogether.

[17] Bearing the above principles in mind, it is appropriate for me to refer to a similar fact-situation which arose in *Yap Sew Lim lwn Pulau Kembar Sdn Bhd* [2005] 7 CLJ 340 (HC). That action was commenced in the sessions court. The plaintiffs claim against the defendant was based on a SPA under which he had paid RM215,200 representing 80% of the purchase price. On the due date for completion and delivery of the unit of shop office, the defendant defaulted. The plaintiff then terminated the SPA. The defendant contended that the plaintiff had claimed the remedy of rescission which was outside the jurisdiction of the sessions court. Abu Samah Nordin J after referring to the aforesaid authorities and in a well considered judgment held that the plaintiffs claim was not for rescission but was based on a termination by the innocent party upon the defendant's breach of the SPA.

[18] I am in entire agreement with the learned judge's conclusion which I hereby apply. I therefore hold that the plaintiff's claim herein arose from its right as an innocent party to put an end to its future obligations under the SPA and so does not constitute a true rescission as provided for in s 69(b). That being the case it is properly within the jurisdiction of the sessions court.

PROPER DEFENDANT

[19] The second defendant raised the issue pertaining to the absence of privity of contract and that the second defendant was not a proper defendant in view of cl 4 in the SPA.

[20] The stand taken for the plaintiff is that the second defendant is the registered proprietor who has executed the SPA and so there was privity of contract.

[21] In my judgment, there can be no doubt that the rights and obligations of the parties are contained in the SPA.

[22] It is pertinent to note that the plaintiff as purchaser has paid the purchase price to the vendor under cl 4. The completion and handing over of vacant possession of the unit is the obligation of the first defendant as the vendor under cl 20, which also provides for liquidated damages in the event of the first defendant's failure to do so as the vendor in that respect.

[23] Whether or not the second defendant as the registered proprietor of the lands can be held liable under the SPA is not plain and obvious, as it would involve an issue pertaining to privity of contract. It is significant to note that such an issue has been

resolved by way of a full trial, as in *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170, and not by way of summary judgment.

[24] In *Hospital Pantai Ayer Keroh Sdn Bhd v Lu Wei Hong* [2005] 4 MLJ 155, there was an application for summary judgment and the issue of the absence of privity of contract was raised. Applying the Privy Council judgment in *Kepong Prospecting Ltd*, I held that it was not a plain and obvious case for summary judgment.

CONCLUSION

[25] By reason of the above grounds, I hold that the liability of the second defendant under the SPA is an issue which ought to be tried. In the circumstances, I hold that the learned sessions judge had erred in entering summary judgment against the second defendnt. I therefore allow this appeal, set aside the order of the court below and order that an early date be fixed for the hearing of the action in the sessions court.

COSTS

[26] As I have sustained the plaintiff's response to the issue of rescission and the defendant's submission asking for the summary judgment to be set aside, their legal position in relation to costs has been put in equilibrium, in which case I order each party to bear its own costs.

Appeal allowed.

Reported by Peter Ling